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FARGO ASSET SECURITIES CORPORATION, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2007-11

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

In re

GABRIELA BENEDETTO,
Debtor(s).

Case No.10-48752-LJT

Chapter 7

R.S. No. JCD-207

MOTION FOR RELIEF FROM
AUTOMATIC STAY
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DATE: September 24, 2010
TIME: 11:00 am
CTRM: 201

1300 Clay Street, Suite 300
Oakland, CA 94604-1426

HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2007-11¹ ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary to enforce its security interest in real property generally described as 4527 Brannigan Street, Dublin, California 94568.

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¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004.

1
2 On or about July 30, 2010, Gabriela Benedetto ("Debtor") filed a voluntary petition under
3 Chapter 7 of the Bankruptcy Code, and Michael G. Kasolas was appointed as Chapter 7 Trustee.
4 As a result of said filing, certain acts and proceedings against Debtor and the bankruptcy estate
5 are stayed as provided in 11 U.S.C. § 362.

6 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and
7 362(d)(2).

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9
10 **I.**

11 **MOVANT IS ENTITLED TO RELIEF FROM THE**
12 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**
13 **NO EQUITY**

14 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
15 debtor does not have any equity in the property and the property is not necessary to the debtor's
16 effective reorganization.

17 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
18 § 362(d)(2) reflects congressional intent to allow creditors to
19 immediately proceed against the property where the debtor has no
20 equity and it is unnecessary to the reorganization, even where the
21 debtor can provide adequate protection under § 362(d)(1).
(Emphasis added).
Id. at 610 (emphasis added).

22 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court
23 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all
24 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief
25 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194
26 (9th Cir. 1984).

27 An appropriate cost of sale factor should also be added to determine if the debtor has
28 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.

1 283, 289 (Bankr. S.D. Cal. 1982).

2 On or about June 12, 2007, Debtor, for valuable consideration, made, executed and
3 delivered to Wells Fargo Bank, NA ("Lender") a Note in the principal sum of \$552,000.00 (the
4 "Note"). Pursuant to the Note, Debtor is obligated to make monthly principal and interest
5 payments commencing August 1, 2007, and continuing until July 1, 2037, when all outstanding
6 amounts are due and payable. The Note provides that, in the event of default, the holder of the
7 Note has the option of declaring all unpaid sums immediately due and payable. A copy of the
8 Note is attached to the Declaration in Support of Motion for Relief From Automatic Stay as
9 exhibit A and incorporated herein by reference.

10 On or about June 12, 2007, the Debtor made, executed and delivered to Lender a Deed
11 of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly
12 described as 4527 Brannigan Street, Dublin, California 94568 (the "Real Property"), which is
13 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and
14 costs incurred as a result of the Debtor's bankruptcy case may be included in the outstanding
15 balance under the Note. The Deed of Trust was recorded on June 19, 2007, in the Official
16 Records of Alameda County, State of California. A copy of the Deed of Trust is attached to the
17 Declaration in Support of Motion for Relief From Automatic Stay as exhibit B and incorporated
18 herein by reference.

19 Subsequently, all beneficial interest in the Deed of Trust was sold, assigned and
20 transferred to Movant. A copy of the Corporation Assignment of Deed of Trust evidencing the
21 Assignment of the Deed of Trust to Movant is attached to the Declaration in Support of Motion
22 for Relief From Automatic Stay as exhibit C and incorporated herein by reference.

23 The obligation under the Note is in default as of October 1, 2009, for failure to make
24 payments to Movant. As of August 13, 2010, the total obligation due and owing under the Note
25 is in the approximate amount of \$598,948.56, representing the principal balance of
26 \$552,000.00, interest in the sum of \$32,759.25, late charges in the amount of \$1,006.25, escrow
27 advances in the amount of \$11,711.50, and a recoverable balance of \$1,471.56. This is an
28 approximate amount for purposes of this Motion only, and should not be relied upon as such to

1 pay off the subject loan as interest and additional advances may come due subsequent to the
2 filing of the Motion. An exact payoff amount can be obtained by contacting Movant's counsel.
3 Further, Movant has incurred additional post-petition attorneys' fees and costs in bringing the
4 instant Motion. Moreover, the total arrears under the Note are in the approximate sum of
5 \$51,966.91, excluding the post-petition attorneys' fees and costs incurred in filing the instant
6 Motion. A copy of the contractual payment accounting pursuant to Local Rule 4001-1(g)(1) is
7 attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit D
8 and incorporated herein by reference.

9 **II.**

10 **RELIEF FROM STAY**

11 **LACK OF EQUITY**

12 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and
13 Statements, the fair market value of the Property is approximately \$450,000.00. True and
14 correct copies of the Debtor's bankruptcy Schedules "A" and "D" are collectively attached to
15 the Declaration in Support of Motion for Relief From Automatic Stay as exhibit E and
16 incorporated herein by reference.

17 Based on the above, Movant maintains that the equity in the Property is as follows:

18	Fair Market Value:	\$450,000.00
19	Less:	
	Movant's Trust Deed	\$598,948.56
20	The cottages HOA Fees	\$1,470.00
	Costs of Sale (8%)	\$36,000.00
21	Equity in the Property:	\$<186,418.56>

22 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since
23 this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is
24 entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

25 **III.**

26 **MOVANT IS ENTITLED TO RELIEF FROM THE**

27 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

28 **CAUSE - LACK OF ADEQUATE PROTECTION**

1 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to
2 adequate protection of its interest in the Property.

3 Movant submits that adequate protection in this case requires normal and periodic cash
4 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed
5 to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

6 Movant is informed and believes that Debtor is presently unwilling or unable to provide
7 adequate protection to the Movant and there is no probability that adequate protection can be
8 afforded to Movant within a reasonable time.

9 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
10 § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

11 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

12 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the
13 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of
14 Trust;

15 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

16 3. Granting Movant leave to foreclose on the Real Property and to enforce the
17 security interest under the Note and the Deed of Trust, including any action necessary to obtain
18 possession of the Property;

19 4. Permitting Movant to offer and provide Debtor with information re: a potential
20 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan
21 Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;

22 5. Alternatively, in the event this court declines to grant Movant the relief requested
23 above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to
24 reinstate and maintain in a current condition all obligations due under the Note and Deed of
25 Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations
26 to pay when due (a) the monthly installments of principal and interest, as required under the
27 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor
28

1 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs
2 incurred in the filing of this motion;

3 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion
4 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy
5 law; and

6 7. For such other and further relief as the court deems just and proper.

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8 Dated: August 26, 2010

PITE DUNCAN LLP

9
10 /s/ JOSEPH C. DELMOTTE (CA SBN 259460)
11 Attorneys for HSBC BANK USA, NATIONAL
12 ASSOCIATION AS TRUSTEE FOR WELLS
13 FARGO ASSET SECURITIES CORPORATION,
14 MORTGAGE PASS-THROUGH CERTIFICATES,
15 SERIES 2007-11
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